United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17466

WILSON M. SMITH, Jr., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 17534

RAYMOND BOWDEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

Did the trial judge err in admitting the testimony of an eye-witness to the murder for which the defendants were tried?

681955—63——1

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COUNTERSTATEMENT OF THE CASE

Appellants Smith and Bowden were indicted on two counts of murder in the first degree of Miksa Merson—(1) killing "while perpetrating and attempting to perpetrate the crime of robbery," and (2) murder "purposely and with deliberate and premeditated malice" (22 D.C. Code § 2401). A third count of the indictment charged them with robbing Miksa Merson of property "of the value of about $116.00, consisting of one wallet of the value of $1.00, one watch of the value of $25.00 and $90.00 in money" (J.A. 1, 2). Smith was 20 years old (Tr. 181). Bowden, age 17 at the time of the crime, was waived from Juvenile Court (J.A. 4, 9). They

were tried before Judge Youngdahl and a jury. The jury found Smith guilty of first degree murder (killing "while perpetrating and attempting to perpetrate the crime of robbery"), second degree murder (lesser included offense of the premeditated murder count), and robbery. It was unable to agree as to punishment for the first degree murder conviction (Tr. 951). The trial judge withdrew from the jury's consideration the murder counts as to Bowden (Tr. 918–919), and the jury found Bowden guilty of robbery (Tr. 951). The judge sentenced Smith to life imprisonment on the first degree murder conviction, to 15 years to life imprisonment on the second degree murder conviction, and to 5 to 15 years imprisonment on the robbery conviction. Bowden was committed to the custody of the Attorney General for 9 years under the provisions of the Federal Youth Corrections Act (J.A. 25, 27).

The crime

Miksa Merson, age 65, was a pianist and teacher (Tr. 473). He lived at 2314 Ashmeade Place, N.W., in the District of Columbia (Tr. 473). Between six and seven p.m. on the night of Saturday, March 3, 1962, he had supper with his brother, Sigmund Merson, at the Sun Restaurant, near 18th and Columbia Road, N.W. (Tr. 474). Sigmund Merson saw Miksa Merson again around 7:30 at the Dart Drug Store at the intersection of Calvert Street and Columbia Road. Miksa Merson was carrying a bag of groceries (Tr. 474–475).

At approximately quarter to eight on the same night, March 3, 1962, Miksa Merson was discovered on the ground by Miss Jo Ann Sparkman, a retired secretary, who was walking in the 2300 block of Ashmeade Place, N.W. on her way to visit friends who lived in that block (Tr. 506–508). She said: "I was approximately half way up the block, maybe a little more, when I heard a groan, and I turned around and looked closely and I saw a man lying beside a parked car in the dark" (Tr. 508). She crossed to 2327 Ashmeade Place, the home of her friends, Mr. and Mrs. William Branch (Tr. 509, 513). Mr. Branch knew Merson slightly (Tr. 514). He told Miss Sparkman to call the police and went to where Merson was lying, almost directly across the street from Mr. Branch's house (Tr. 515–

516). "I saw a body lying in the tree box in the shadow of the tree, with a bag of groceries lying on the ground beside him * * * I turned him over and could see that his face was covered with blood * * * my wife got some cloths and I cleaned his face up so that I could recognize him. His face was so covered with blood that I couldn't recognize him immediately * * * He had a very considerable head wound starting on the forehead and apparently extending back into the hair * * * (Tr. 515–517) * * * When I first turned him over, I said: "What happened Mr. Merson? And he groaned and said some things in a foreign language, which I understand probably was Hungarian * * * I asked him what had happened; and he said: They hit me. And I said: Who hit you? And he just said: They hit me. Then he said: I want to get up. And I told him that he couldn't. And he kept struggling to arise. So I dragged him over against the steps of the house in front of the tree box, and leaned him against my shoulder, and sent my wife over to see if she could get a blanket to cover him up with because he was going into shock * * * I cleaned him up as best I could, put a towel on the wound to try and check the bleeding, and sent my wife over to get some blankets and laid him out flat on his back and covered him with a blanket, in trying to prevent him from going into shock, which he did before they got there" (Tr. 520–522).

Merson was taken to Georgetown Hospital. There Dr. Alfred Luessonshop, a neuro-surgeon, first saw him about 9:30 p.m. (Tr. 439–440). "When I first saw him he was on the operating table * * * He was decerebrate, which means that his brain was so damaged either by pressure or trauma that it was not functioning. He was in shock which was secondary to the bleeding * * * He had a laceration of the scalp on the right side, just behind the forehead. He had an opening made in his windpipe to establish an airway for breathing. Arrangements were made to give him blood transfusions immediately and the area of his scalp under which he had a depressed skull fracture was opened and the vitals of bone removed and blood clot over the surface of his brain removed. The blood was pumped into his legs, when his heart stopped ultimately, then his chest was opened and his heart was massaged for about an hour"

(Tr. 440–441). These treatments did not save Merson's life. He died about 11 p.m. (Tr. 441–442). "The cause of death was compound depressed skull fracture of the frontal bone with hemorrhage over the surface of the brain and hemorrhage externally resulting from shock" (Tr. 442).

The investigation

A. Pre-arrest

At 6:45 a.m. on Sunday, March 4, the morning after the crime, Captain (then Lieutenant) Donahue of the homicide squad went to the scene of the crime (Tr. 672–673). In front of 2312 Ashmeade Place he found "a part of a tree limb" (Tr. 673). Human blood of the same type as Merson's was found on the limb (Tr. 458–460, 679–681). The limb also had on it "a fragment of a brown head hair and a fragment of a white head hair of caucasian origin" which had the same microscopic characteristics as the brown and white head hairs taken from the dead man, who was caucasian (Tr. 450, 458–459; 686–687).

Merson carried personal papers in his wallet (Tr. 482). A telephone call by a citizen led Officers Preston and Schwab to the 1700 block of P Street, N.W. on the afternoon of Monday, March 5 (Tr. 420–421, 585, 693). In front of 1720 P Street they found one of Merson's visiting cards, and a card or coupon addressed to the "occupant" of an address in the 2300 block of Ashmeade Place other than Merson's (Tr. 421–422, 424, 481, 585–586, 693). On Thursday morning, March 8, an envelope addressed to the Chief of Police containing an anonymous note and 11 cards bearing Merson's name was received by mail in the office of the Chief of Police (Tr. 422, 424, 476–481, 332–333, 587, 692, 699–701). Among the cards were Merson's driver's license, his car registration, a Group Hospitalization card, cards identifying him as a member of the Hiram Lodge of the Masons, the American Automobile Association, and the Washington Music Teachers Association, a library card, and cards from the Western American Insurance Company and the Standard Life and Accident Insurance Company (476–481). These cards were turned over to the F.B.I. on Thursday, March 8, to be examined for fingerprints (Tr. 692, 707–708). By 10:00 a.m. Saturday morning, March 10, it had been deter-

mined that the car registration card had an unidentified palm print on it (Tr. 143–144, 708).

Merson owned two watches, an inexpensive one and a gold one. Sigmund Merson said it was his brother's habit to wear one or the other of the two watches. After Merson's death his brother found the inexpensive watch among Merson's belongings (Tr. 482–486). The phase of the investigation involving the gold watch was Officer Eccles' particular concern. Merson's brother told Eccles that the watch was a 23 jewel Bulova with a sweep second hand (Tr. 301–302). Eccles' search for the watch commenced with Merson's death, but it could not be found among Merson's property, or through the pawn office (Tr. 327).

B. Arrest and post-arrest

On the night of Friday, March 9, Officer Waters was patrolling his beat in the vicinity of the Merson murder (Tr. 117–118). Through a police call box he received a report that a pocketbook snatching had been committed by two males in the 1800 block of Biltmore Street, N.W., about 7:30 that evening (Tr. 118, 122). He was given a description of the robbers which he noted in his notebook (Tr. 119). "[T]wo colored males, one was about five foot one, dark clothing, and the other was about five-ten and had dark clothing. They had committed a robbery in the 1800 block of Biltmore Street earlier in the evening * * * One was about 140 pounds and the other was just heavy, there was no actual weight" (Tr. 118, 119). A few minutes after receiving the report, Waters saw Smith and Bowden in the 2400 block of 20th Street, which is around the corner from the 1800 block of Biltmore Street and half a block to a block from the 2300 block of Ashmeade Place (Tr. 118, 120–121). Waters called to Smith and Bowden and engaged them in conversation. They told Waters that they did not live in the area, and said that they had come into the neighborhood by bus. "I asked them what they were doing in this neighborhood at this time of night, if they didn't live here, and they stated they were on their way to Capitol Arena." Waters knew that Capitol Arena is at 14th and W Street, N.W., a mile and a half or two miles away, and the pair was not

walking in the direction of Capitol Arena (Tr. 119–120). Taking into account the identification he had been provided with earlier and the improbable story told by Smith and Bowden, Waters arrested them for the robbery that had occurred around the corner on Biltmore Street earlier that evening (Tr. 120–123, 127). The arrest occurred at 9:50 p.m. (Tr. 118).

Detectives Curtis and Forsythe responded to Waters' call and, upon being advised by Waters of the reason for the arrest, transported Smith and Bowden to No. 13 precinct (Tr. 121, 125). They arrived at No. 13 sometime before 10:45, the detectives having to go by way of Freedman's Hospital on other business (Tr. 131–132). At the precinct Smith and Bowden were put in a line-up and were not identified in connection with the pocketbook snatching (Tr. 132–133). Bowden, a juvenile of 17, was released to his parents at about midnight on that night (Tr. 133). Smith, an adult, age 20 (Tr. 181), was kept overnight in the cell block at No. 13 (Tr. 130). It appears he was questioned at No. 13 only briefly for the purpose of making out the line-up sheet (See Tr. 139). At 8:45 a.m. the next morning, Saturday, March 10, Smith was brought to a roll call line-up at police headquarters (Tr. 130, 133, 135). There he was viewed by the detectives on duty, and his line-up sheet, which gave the circumstances under which he was arrested, was read to the detectives (Tr. 135–136). Smith had been kept overnight and placed in the line-up because of the circumstances of his arrest and the improbability of his story (Tr. 134, 136). Among the detectives present at the line-up was Detective Preston, the homicide officer primarily responsible for the investigation of the Merson murder (Tr. 129, 135). Preston testified: "The purpose of the line-up is to acquaint the detectives working throughout the city with the persons who have been arrested in the city so that they may be identified, perhaps, as connected with some other crime in a precinct other than their own" (Tr. 136–137). Prior to seeing Smith in the line-up and hearing the circumstances of his arrest, he knew nothing about him or his arrest (Tr. 137–138). Preston noted that Smith had been arrested close to the scene of the Merson murder, "[h]e was wearing a jacket that ap-

peared to have blood on it, or blood stains. I wondered whether it was true that he had been looking for the Capitol Arena and so far away from the Capitol Arena." Smith's line-up sheet showed that he had been living in the District of Columbia for 7 years (Tr. 139). "There are no business places or theaters in the particular area where they had been arrested and I wondered why he was in this area" (Tr. 139). These considerations caused Preston to send for Smith after the line-up was over (Tr. 138–139). Preston took Smith to the homicide squad office in the same building, at about 9:05 a.m. (Tr. 138). He told Smith that he did not have to make a statement (Tr. 179–180). He asked Smith why he had been in the area of his arrest, and Smith said he was looking for the Capitol Arena. He also told Preston that he had never been to the Capitol Arena and had no idea where it was (Tr. 140–141). Preston asked Smith where he had been on the evening of March 3, the night of Merson's murder. Smith replied that he went to a movie on 7th Street, but he did not recall the name of the theater, the admission price, or the names of the pictures he had seen (Tr. 140). He said he was sure he entered the theater about 7:30 p.m. The hour of 7:30, which Preston knew to be the approximate time of the murder, was mentioned by Smith without Preston having made reference to such hour (Tr. 140–142). Preston: "I asked him if he had been with anyone on the evening of March 3d and he said that he had been alone. I asked him where he got the blood on his coat and he told me that he had been in a fight on the previous Wednesday [March 7], * * * and that he had hit somebody in the nose and the blood had got on his coat that way." Smith said he was wearing a different coat on March 3 (Tr. 142). At 10:05 a.m., Preston, with Smith's consent, had Smith's fingerprints and palm prints taken. He knew of the unidentified palm print on Merson's registration card by this time (Tr. 143–145). (On the morning of March 12 it was determined that the print on the card and Smith's print matched—Tr. 145). At about 11:20 a.m. Smith consented to take a polygraph examination. This examination was completed at 2:00 p.m. From it Preston concluded that Smith "was not truthful, that he was, in fact, involved in the homicide" (Tr. 146–147).

Meanwhile, at 10:30 a.m., Officer Eccles went at Detective Preston's request to Bowden's house to find out from Bowden if he had been with Smith on March 3 and to ask Bowden to come to headquarters. At Bowden's house, Eccles asked Bowden's mother if she would consent to Bowden's going to headquarters, and she said that she would. She called to Bowden, who came downstairs. Eccles told Bowden the purpose of his visit, and asked him if he would be willing to go with him to the homicide office to try and clear Smith. Bowden agreed to come. Bowden was not a suspect in the Merson case at the time, and had he refused to come to headquarters, Eccles testified that he would not have required him to come (Tr. 141–142, 303–306).

When Eccles and Bowden arrived at the homicide office, Eccles asked Bowden to have a seat while he went about other business (Tr. 308). About half an hour later Eccles noticed that Bowden was wearing a watch that, except for the band, fit the description of Merson's watch. He asked Bowden if the watch belonged to him and where he got it. Bowden replied that his mother had given it to him some time before. Bowden's mother had come to the homicide office and was sitting in another room. Eccles went to her and asked her if she had ever given Bowden a watch. She replied that she had not. Eccles told Bowden what his mother had said. Bowden said his mother was telling the truth, that he had gotten the watch from a boy on March 3, while riding a bus. He did not know the name of the boy. Eccles then asked Bowden about the black cloth watch band on the watch. Bowden said that when he got the watch it had a stretch type band on it and that he had taken it off and thrown it away. The officer then told Bowden that he was under arrest for the Merson murder and that he did not have to make a statement (Tr. 308–313, 322–324). After placing him under arrest, Eccles took the watch from Bowden (Tr. 325).

Detective Preston first talked with Bowden at 2:00 p.m., upon the completion of Smith's polygraph examination (Tr. 217). It appears that from the time Eccles took the watch from Bowden until 2:00 p.m. there was little or no questioning of Bowden (Tr. 326). Preston advised Bowden of his right

to remain silent (Tr. 218). Bowden denied involvement (Tr. 218). He wanted to take the lie-detector test (Tr. 220). He was given the test commencing at 2:00 p.m., and ending at 6:00 p.m. (Tr. 150). Preston concluded from this examination that Bowden was also untruthful (Tr. 148). Bowden then told Preston that "Smith had done it and told [Bowden] about it," but that he (Bowden) wasn't there (Tr. 148). Thereupon Smith and Bowden were brought together, and Bowden retracted his statement implicating Smith, and Smith again denied the offense (Tr. 149). Shortly thereafter Bowden admitted his involvement and offered to show the escape route (Tr. 148, 151). (This apparently occurred after Smith had been taken from the room where Bowden was. Smith was placed in the cell block in the basement of the building at 6:52 p.m.—Tr. 151.) Preston, Officer Buch and Bowden left at 6:45 p.m. to trace the route. Bowden was imprecise about which street the crime occurred on but he was sure that the loot—money and the watch—had been divided on P Street in the area of 17th and 18th Streets, N.W. (Tr. 153–154). "[H]e described throwing away some articles and he wasn't sure where they had thrown away the wallet" (Tr. 154). He said that Smith "hit the man" twice, and that he (Bowden) had taken the wallet and handed it to Smith while he was still kneeling over the man. Bowden further said that Smith took the watch because Smith was closer to the arm on which Merson was wearing it than Bowden (Tr. 154–155). Some time after 7:30 p.m., Bowden signed a written statement admitting his involvement (Tr. 154). Thereafter, around 8:00 p.m. or a little afterwards, Attorney Wesley Williams came to the homicide office to see Bowden. He told Bowden that "if he was involved, that he should tell the truth, and be entirely truthful and clear it up" (Tr. 199, 220–221). Papers were then made on Bowden by the juvenile squad and he was taken to the Receiving Home (Tr. 156, 222).

On Sunday, March 11, at 10:30 a.m., Smith was questioned again by Preston (Tr. 157). Before questioning him Preston again told Smith that he did not have to make a statement (Tr. 179–180). Aside from his confrontation with Bowden shortly after 6:00 p.m. on Saturday, where he reiterated his

denial, Smith had not been questioned since 2:00 p.m. on Saturday when his polygraph examination was completed (Tr. 149, 160). Of the questioning on Sunday morning Preston said: "I feel that we had good rapport between us . . . There was no reluctance on the defendant Smith's part to talk to me. He talked to me about some personal matters and things that had happened earlier in his life, and the job that he had had, and various things. This was a free and easy conversation between us." About 11:15 a.m. Smith started to cry and told Preston: " 'I want to tell you about it.' I gave him my handkerchief at that time and he dried his eyes, and he says, 'I'll tell you the truth now,' and he extended his hand and we shook hands." (Tr. 246–247). Smith said he first wanted to see Bowden (Tr. 170–171, 223). However, he gave an oral confession before Bowden had been brought from the Receiving Home (Tr. 223). (Bowden arrived at the homicide office between 12:00 and 12:30 p.m.—Tr. 170, 224). This confession included a reference to Phillip Holman, age 14 (Tr. 535), whose involvement Preston first heard about from Smith at about 11:30 a.m. (Tr. 172). Preston testified: "[Smith] stated that Phillip Holman had been at Raymond Bowden's house when he had gone there and that he and Bowden decided to go up town to make some money, and that Phillip Holman wanted to go along and that they said okay. However, they had a conversation about his being too small to go, but Holman wanted to go so Holman went."

"They stated that after reaching the area of 18th and Columbia Road, while making the circle of several blocks and when on the corner of Mintwood and Columbia Road, they saw a stick or tree limb lying on the ground. Smith stated that either he or Bowden picked up the tree limb, he wasn't sure of that. However, he was sure that Holman carried it under his coat because Holman was wearing a long coat and he could conceal this tree limb * * * Smith then told me that after walking several more blocks and going through the park and having the incident with the woman in the park,[1] that they then went to

[1] This lady was Miss Wilma Williams. The police had spoken to her before the arrest of Smith and Bowden (Tr. 143, 598). She testified at the trial (Tr. 594–610).

Ashmeade Place and when on Ashmeade Place Smith stated he saw an automobile driving up the street and park in approximately the middle of the block.

"That he then took the tree limb from Holman and they made an agreement there that if the man got out of the automobile and stayed on the side of the street that the car was parked on that Smith would get him. If he crossed the street that Holman and Bowden would get him. However, the man got out of the car, locked the car, and remained on the side of the street that the car was on, so Smith then was on that side of the street.

"Just after the man locked the car Smith said he went up behind him and he hit him one time with the club. Between the first and second blows with the club Raymond Bowden then ran across the street.

"Smith told me that the man started to get up and so he hit him again and the man didn't move then. He said that by that time Bowden was there, that Holman remained across the street, that they then got the watch and money and snap purse and ran. They ran a short ways on the same side of the street that they had hit the man on, and then crossed the street and were joined by Holman and they all three ran together." (Tr. 172–174).

Preston also said that after Bowden arrived from the Receiving Home, Bowden and Smith "collaborated" on giving a description of Holman (Tr. 225). From this description and juvenile records the police found Holman's name (Tr. 225–226).

After Smith gave his oral statement he, Preston, and Captain Donahue went to the scene and retraced the escape route (Tr. 162, 175). The route was "south on Ashmeade Place, south on Connecticut Avenue to Leroy Place, west in the 2100 block of Leroy Place, south on Phelps Place, down some steps * * * to 22nd Street, south on 22nd to P, east on P Street around Dupont Circle, continued east on P Street to 17th Street, north on 17th to Q, east again on Q Street. * * * While we were on Leroy Place he mentioned that he had also taken a snap type purse from the decedent. We didn't know that this was missing. He pointed out the place that he had thrown it. Cap-

tain Donahue * * * got out and looked and couldn't find it. Smith said to me, let me get out—I think I have an idea. So I got out with him and he walked over to the premises 2114 Leroy Place and picked up this snap type purse" (Tr. 162–163). The purse was later identified by Miksa Merson's brother, Sigmund (Tr. 163).

In the 1700 block of P Street, N.W., Smith pointed out a bush where he had put a quantity of papers. It was the same bush where officers had recovered papers earlier (Tr. 163).

Preston and Smith returned to the homicide squad office at 2:15 p.m. A written statement was taken from Smith and completed at 3:30 p.m. (Tr. 163–164, 175). Shortly after 4:00 p.m., Sigmund Merson came to the homicide squad office. Smith told Sigmund Merson what they had done and Bowden agreed that the story was true (Tr. 164, 177–178). Smith said he was sorry (Tr. 164). Then Smith was placed in the cell block (Tr. 164, 178). Bowden and Phillip Holman, who had been arrested, were sent to the Receiving Home (Tr. 178).

On Monday morning, March 12, at 10:00 a.m., Smith was presented to the Commissioner (Tr. 164, 178, 179). On Wednesday, March 14, there was a coroner's inquest into the death of Miksa Merson. Smith was represented there by an attorney from the Legal Aid Agency (Tr. 181–182). Neither Smith nor Bowden testified at the inquest (Tr. 183). Holman, however, testified there (Tr. 182).

At noon the next day, Thursday, March 15, Preston brought Smith's friend, Doris Moorfield, to the jail to visit Smith. Smith had requested that he be allowed to talk with her and Doris Moorfield had said she would like to see Smith (Tr. 184–186, 247). Preston had arrangements made so that Smith and Doris Moorfield could talk at a table in the rotunda of the jail (Tr. 186). Preston was present during the conversation, in which Smith confessed the crime to the girl (Tr. 186–190).

On March 23, the Juvenile Court waived its jurisdiction over Bowden. On the morning of the same day, he was presented to the Commissioner (Tr. 156, 191–192). Before and after his presentation Bowden spoke to Preston again about the crime (Tr. 192–196).

The pre-trial hearing

On October 17 and 18, 1962, prior to the trial but after the jury had been sworn, there was a hearing on appellants' motions to supress evidence. Judge Youngdahl heard testimony regarding the arrest of appellants, their detention, and their confessions (Tr. 115–377). The government conceded the inadmissibility, under *Mallory* as to Smith and under *Harling* as to Bowden, of the confessions made before appellants were brought before the Commissioner (J.A. 11, 12). The judge ruled that statements of appellants made after their respective presentations to the Commissioner, Smith's finger and palm prints taken Saturday morning, March 10, and Miksa Merson's watch were inadmissible (J.A. 13–18). He ruled admissible the proffered testimony of Holman, the 14 year old, who had been committed to the Receiving Home as a result of juvenile proceedings in which he was charged with receiving stolen property (J.A. 22, Tr. 633–634). In admitting Holman's testimony the judge wrote that he thought it should be excluded but that "uncertainty" in the law on the issue did not permit him to exclude it (J.A. 18–22). The judge also ruled admissible a palm print which was taken from Smith on October 15, 1962, while he was in custody awaiting trial (Tr. 426, 578–583).

The trial

At trial those who discovered Miksa Merson on the ground, the doctor who operated on him, personnel of the coroner's office, and those who identified the body testified (Tr. 435–534). Additional testimony linked the hair and blood on the club found at the scene with Merson's hair and blood (Tr. 458–460, 672–691). Officer Schwab told of finding one of Merson's cards in the 1700 block of P Street on March 5 (Tr. 476–481, 691–694). Officer Tayman told of receiving other cards of Merson's in police mail on March 8 (Tr. 476–482, 698–702). Fingerprint experts testified that a palm print found on one of these cards, the car registration card, matched Smith's palm print (Tr. 702–719).

Sigmund Merson told of seeing his brother on the night of the crime (Tr. 474–475). He identified his brother's cards (Tr. 476–481). He said that Miksa Merson "always carried

papers in his wallet" (Tr. 482). He further said that Miksa Merson owned two watches, an inexpensive one and a gold one, that it was his habit to wear one or the other of the two watches, and that he had found the inexpensive watch in his brother's belongings (Tr. 482–486).

Miss Wilma Williams, of 2308 Ashmeade Place, testified that she was walking in Kalorama Park, near the 2300 block of Ashmeade Place, about 7:45 p.m. on the evening of the crime. She was pushing her grocery cart in front of her (Tr. 594–595, 599). She said: "I felt [a man Miss Williams identified to the jury as Smith] behind me and I turned around and saw him and screamed and he said, 'I am not going to hurt you; don't be afraid', and he walked on past me * * * I hesitated, stood there awhile, and he was joined at the end of the park by two more boys. They proceeded down Belmont Road, cross 20th, turned left [into the 2300 block of Ashmeade Place], and that is the last I saw them" (Tr. 596, 598, 599, 601–602). A few minutes later, as she was walking in Ashmeade Place to her home, she came upon Miksa Merson and the group assisting him (Tr. 604–605).

Phillip Holman testified that he had known Bowden for about seven years. He had known Smith "by face" for about two months (Tr. 536, 540–541, 638). On the night of the crime, about 6:30 p.m., Holman went to Bowden's house (Tr. 541). While Holman was waiting for Bowden to come downstairs to see him, Smith came in. There was a conversation between Smith and Bowden's sister. "He asked was Raymond home, too, and then Raymond's sister said he was asleep. He said: Can you wake him up because it's kind of urgent" (Tr. 543–544). Bowden came downstairs. There was a conversation between Smith and Bowden. "I heard Wilson Smith was in the front room and was talking to Raymond Bowden about making some money * * * I heard Smith say something about, I thought you were going to be ready, and something about making money" (Tr. 545). Smith and Bowden left the house, with Holman following (Tr. 548–549). They got on a bus which took them to Seventh and Florida Avenue. They transferred to another bus (Tr. 550). After they got off that bus they walked through a park. "While we were walking through

the park, me and Bowden and Smith, and me and Bowden was walking together, and Smith, he was a little in front of us, and this lady was going through the park with one of those push-carts people [carry?] their groceries in, and when walking through the park, Smith walked up behind the lady, and the lady hollered, she screamed, * * * and then Smith say something like: I am not going to hurt you lady" (Tr. 551, 552–553, 644). They continued on. "We stopped at this tree box", in which a stick was lying. (Holman identified the stick as the one in evidence.) Smith picked up the stick. "Smith held it for a while and walked about three or four steps, and then he say—he gave it to me and told me to put it under my coat; and I put it under my coat." The reason Smith told Holman to put the stick under his coat was "something about—didn't want the police to see it" (Tr. 553–554). Holman carried the stick "about twenty paces" when "Smith told me to drop the stick and I dropped it" (Tr. 555). After Holman dropped the stick "me and Bowden walking together and Smith * * * he stayed behind * * * and crossed on the other side of the street" (Tr. 556). About this time Holman saw a car pull up and a man get out (Tr. 556). He saw Smith hit the man from behind with the stick (Tr. 562–564, 664, 666). He heard the sound of several blows (Tr. 664–665). Holman then saw Bowden go across the street (Tr. 558, 562, 563–564, 666–667). Holman did not go across the street (Tr. 562). "I walked down the street. Then Smith and Bowden, they ran by me" (Tr. 565). Holman ran with Smith and Bowden about 15 minutes, ending up on a corner near Dupont Circle (Tr. 565–566). Smith took out a wallet, took money from the wallet, "split the money up between him and Bowden and then he gave me ten dollars" (Tr. 566–567) * * * "Smith said ten for you, ten for me, ten for you, ten for me, then when he got down to the odd parts of the money like $5, something like that, he divided that" (Tr. 619). "He said, I started to not give you but five * * * When I was looking at him he said, What do you expect for nothing * * * He said, if you just came across the street and searched the man's pockets * * * you would have gotten some more" (Tr. 620). "Smith took the papers out the wallet and started throwing them around" (Tr. 567, 620). Afterwards Holman

saw a watch in Smith's hand and saw Smith give Bowden the watch in return for some money (Tr. 623–625). Then the three went to Smith's girl friend's house by bus, and "after we left the house I left them and went home" (Tr. 626–627).

At the coroner's inquest Holman had said that he didn't see Merson because he (Holman) "had left" and that he didn't know what Smith did (Tr. 628–629, 660–661). At the trial he said he decided to tell the true story because "I used to think about it all the time * * * I used to think about it at night all the time * * * I kept thinking about the man, the man dead" (Tr. 629).

As noted, p. 2, *supra*, the jury convicted Smith of felony-murder, second-degree murder and robbery, and Bowden of robbery.

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 2401 provides:

> *Murder in the first degree—Purposeful killing—Killing while perpetrating certain crimes.*—Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to prepetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22–401 or 22–402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

Title 22, District of Columbia Code, Section 2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

The "fruit of the poisonous tree" doctrine does not attach to evidence the mere existence of which was revealed in confessions which were themselves excluded under *Mallory* v. *United States* and *Harling* v. *United States*. In any case, the testimony of the 14 year old witness Holman, whom appellants mentioned in their inadmissible confessions, is admissible. An exclusionary rule that might be thought to exclude inaminate evidence of crime does not apply to the live testimony of an eye-witness. The Court ought not to insulate appellants from Holman's independent knowledge of the Merson murder. The unique facts of record surrounding this crime and the particular witness, and the arrest of appellants in circumstances compelling the conclusion that they were about to repeat their crime, make it insupportable for appellants to claim that Holman would not have been found but for their mention of him. Furthermore, the connection between the statement of each appellant about Holman and the discovery of Holman's identity, and between Holman's discovery and his actual trial testimony, is too attenuated for either appellant to be entitled to exclusion of Holman's testimony. The trial judge's dictum challenging the admissibility of Holman's testimony does not take account of these considerations, which require affirmance of the convictions.

ARGUMENT

The trial judge correctly permitted the witness who observed the murder of Miska Merson to testify

A. The "fruit of the poisonous tree" doctrine does not apply to *Mallory* and *Harling* confessions

Appellants say that the testimony of Holman should have been excluded under the "fruit of the poisonous tree" doctrine because Holman's presence at the scene was first brought to the notice of the police by Smith during his illegal detention, and because Bowden, a juvenile, joined Smith in providing a description of him. But the *McNabb-Upshaw-Mallory* exclusionary rule enforcing the statutory command of Rule 5(a) and its predecessors has traditionally been applied to

confessions alone.[2] Similarly, *Harling* v. *United States*, 111 U.S. App. D.C. 174, 295 F. 2d 161 (1961), speaks only of confessions. Appellants cite no case where any court has employed the "poisonous tree" doctrine to exclude the testimony of witnesses, or for that matter any tangible probative evidence, the existence of which was revealed in a *Mallory* or *Harling* confession.[3] *Silverthorne*[4] and *Nardone*,[5] the leading "poisonous tree" cases, do not require the extension of "poisonous tree" to *Mallory* and *Harling*. In *Silverthorne* the Supreme Court held that the government could not subpoena papers that had been seized in an unconstitutional search of the defendant corporation's premises and later returned, when the description of the papers in the subpoena depended on knowledge of the papers gained by the search. In *Nardone* the Court dealt with the anti-wiretap statute, which specifically provides against divulgence of tapped conversations. 47 U.S.C. § 605.[6] Neither case purported to pass on the question of how far a judge-made exclusionary rule enforcing a non-constitutional statutory command should be extended.

In *Killough* v. *United States*, —— U.S. App. D.C. ——, —— F. 2d —— (1962), this Court, acting completely within an exclusionary rule applicable to confessions, barred a con-

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[2] *McNabb* v. *United States*, 318 U.S. 332 (1943); *Upshaw* v. *United States*, 335 U.S. 410 (1948); *Mallory* v. *United States*, 354 U.S. 449 (1957).

[3] Compare *Watson* v. *United States*, 101 U.S. App. D.C. 350, 249 F. 2d 106 (1957), and *United States* v. *Klapholz*, 230 F. 2d 494 (2d Cir. 1956), cert. denied, 351 U.S. 924, which negate consent to an unconstitutional search without a warrant of the private homes of prisoners detained in violation of Rule 5(a). Compare also *Wong Sun* v. *United States*, 371 U.S. 471 (1963). There the Supreme Court excluded narcotics secreted in a private house which the police had been led to by an involuntary statement given upon the unconstitutional invasion, without a warrant, by six or seven police officers into the defendant's house and his bedroom, where his wife and child were sleeping. The ruling in *Wong Sun* based on these unique circumstances does not entitle Bowden to claim (Br. 26) that his confession is inadmissible on non-*Harling* grounds, and that "fruit of the poisonous tree" applies to it, even granting the trial judge's ruling, which we dispute, that Bowden was placed under arrest before it appeared that he was wearing Merson's watch (J.A. 5, 16–18; Tr. 303–313, 325; counter statement, *supra*, p. 8).

[4] *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920).

[5] *Nardone* v. *United States*, 308 U.S. 338 (1939).

[6] See the first *Nardone* case, 302 U.S. 370 (1937).

fession which it found would not have been made had not an earlier inadmissible confession been made. The majority did not cite *Silverthorne* and *Nardone*. Neither does the Court's opinion in *Jackson* v. *United States*, 106 U.S. App. D.C. 396, 273 F. 2d 521 (1959), relied on by the majority, cite them. To be sure the language of the majority opinion in *Killough* employed some of the vocabulary of the "fruit" doctrine, but the Court limited the issue in that case to admissibility of a confession.[7]

B. Whether or not the "fruit of the poisonous tree" doctrine applies to appellants' confessions, the testimony of the witness Holman, who observed the murder of Miksa Merson, is admissible

1. The Court ought not to insulate appellants from the witness Holman's independent knowledge of the Merson murder, or to assume that but for appellants' mention of him Holman would not have come forward or been discovered

Whatever may be said in general about extending the exclusionary rule of *Mallory* and *Harling* by adding the "fruit of the poisonous tree" doctrine to it, and even if Bowden's statement is assumed to be excludable on non-*Harling* grounds,[8] the "poisonous tree" doctrine plainly does not reach the testimony of Holman in this case. It is an unconscionable proposition that a criminal's mention of a witness in an inadmissible confession should immunize the criminal from the testimony of a witness. Smith's and Bowden's fundamental and incurable error was that they allowed Holman to view their crime. This Court should not cure their error by insulating them forever from Holman's independent knowledge of

[7] The *holding* in *Bynum* v. *United States*, 104 U.S. App. D.C. 368, 262 F. 2d 465 (1958), was that fingerprints taken after an unconstitutional arrest are inadmissible. In reaching this result this Court extended the rule that requires suppression of articles seized from an accused person upon such an arrest. See Note, 69 Yale Law Journal 432 (1960). The Court made an analogy between this holding and the exclusion of confessions in cases where Rule 5(a) has been violated. But we do not understand the Court to have held in *Bynum* that the "fruit" doctrine can be extended to a confession excludable under *Mallory*. The applicability of that doctrine was not suggested in *Bynum*. The opinion did not cite *Silverthorne* and *Nardone*. Compare the second *Bynum case*, 107 U.S. App. D.C. 109, 274 F. 2d 767 (1960), and the discussion of it in *Payne* v. *United States*, 111 U.S. App. D.C. 94, 97–98, 294 F. 2d, 723 (1961), cert. denied, 368 U.S. 883.

[8] See n. 3, *supra*.

the crime. Smith and Bowden, not the police, let the cat out of the bag when they let Holman witness the crime. The Court should not put the cat back in the bag.[9]

There are obvious and substantial distinctions between a human witness to crime mentioned in an inadmissible confession and inanimate evidence revealed in such a confession. It is one thing to exclude or to propose exclusion of the concealed weapon posited by Judge Wright in *Killough*, or the narcotics and papers secreted in private premises in *Wong Sun* and *Silverthorne*, or the kinds of evidence mentioned in *Bynum*, or the confession in *Killough*. It is quite another thing to propose the exclusion of the testimony of a witness about his own observation of a crime, where the witness is not under the control of the defendant, and is not capable of being hidden from

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[9] See *Payne* v. *United States*, n. 7, *supra*, where this Court exhibited a practical spirit of unwillingness to suppress the testimony of a witness when the argument was urged that the illegal detention of the defendant required such suppression.

In *Payne* the defendant's illegal detention gave the police time to bring one who had made a complaint of a larceny similar to the one for which Payne was arrested to the precinct for confrontation and identification of Payne. There are, to be sure, some factual differences between *Payne* and the present case, including the fact that in the present case Smith had silenced the testimony of the complainant forever. But what is crucial in *Payne* is the Court's refusal, where the confession given during the period of illegal detention had been suppressed, to suppress the testimony of the witness on the ground that the illegal detention was the source of his testimony. The Court said: "The suppression of the testimony of the complaining witness is not the right way to control the conduct of the police, or to advance the administration of justice. The rights of the accused in a case like the present are adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination." This language applied to the complaining witness in *Payne* is fully applicable to the testimony of the witness Holman in the present case. None of the suspicions about trustworthiness or coercion which may attach to a pre-trial confession offered as evidence attach to Holman's testimony, which was given in open court, and which was subjected to searching cross-examination. Holman is not Smith's and Bowden's creature. The suppression of the truth to which he bore, and *still bears*, witness is as "unthinkable" here as the suppression of the complainant's testimony was in *Payne*. It bears repeating that such suppression "is not the right way to control the conduct of the police, or to advance the administration of justice."

It must also be noted that the Court in *Payne* rejected the application to the witness of the kind of "but for" argument appellants make here with respect to Holman. See the discussion on this matter in this brief, *infra*.

the world beyond any expectation of discovery, and where any one of an infinite variety of possible circumstances may bring him forth. The Court should not readily accept in any case the assumption that a witness, a human being with an independent will, would not have come forward or been discovered but for an inadmissible confession. Particularly should it not accept such an assumption in this case. Holman was a child of 14 (Tr. 535), not a professional criminal experienced in stilling his conscience and covering his tracks. He was a witness not to a burglary or a car theft, but to a most atrocious murder. He saw Smith strike Merson with a club, from behind (Tr. 562–564, 664–666). He heard the sound the club made when it crushed Merson's head (Tr. 664–665). He heard the sound of not one but several blows (Tr. 664–665). He knew that Smith and Bowden had removed Merson's wallet from his pocket and his watch from his arm as Merson lay dying (Tr. 566–567, 619–620, 623–625). He told the jury: "I used to think about it all the time * * * I used to think about it at night all the time * * * I kept thinking about the man, the man dead" (Tr. 629). Appellants ask this Court to adopt the assumption that neither the weight of the recollection of what this 14-year old boy had seen and heard, nor his conscience, would have ever caused him to reveal the crime, if not to the police, to some relative or acquaintance who would have notified the police. We respectfully submit that it would be extreme, and indeed insupportable, for the Court to put its imprimatur on such a proposition. Furthermore, it is very significant that on Friday night, March 9, less than a week after the Merson murder, Smith and Bowden were again in the area of Ashmeade Place, "where there are no business places or theaters," and that they had a wholly improbable explanation for their being there (Tr. 117–121, 139–141). The conclusion is inescapable that had Officer Waters not arrested them when he did, the pair would have committed another crime on that night or on a later night. The Court must assume that investigation of such crime would have led to discovery of Smith's and Bowden's connection with the Merson murder, and to Holman. *By any realistic view of the matter, appellants cannot claim, and are simply not in a position to claim, that but*

for their mention of Holman on Sunday, March 11, 1962, Holman would not have been found. In such circumstances, exclusion of Holman's testimony would amount to an unwarranted penalty on the police and the public.

2. The contribution of each appellant to Holman's description was so attenuated by the contribution of the other, and by the fact that either could have led the police to Holman independently, that neither appellant is entitled to exclusion of Holman's testimony. Similarly, the connection between the discovery of Holman's identity and his testimony at trial is too attenuated to entitle appellants to exclusion of his testimony.

Apart from the considerations heretofore discussed, the Court should note how attenuated are the relationships between Smith's inadmissible reference to Holman and the discovery of Holman, between Bowden's inadmissible reference to Holman and the discovery of Holman, and between Holman's discovery and his testimony. *Nardone* v. *United States,* 308 U.S. 338 (1939); *Gregory* v. *United States,* 97 U.S. App. D.C. 305, 231 F. 2d 258 (1956).

a. The first mention of Holman was by Smith on Sunday morning, March 11 (Tr. 172). Thereafter Smith and Bowden joined in giving a description of Holman (Tr. 225). Thus the record shows that neither Smith nor Bowden was more than partially responsible for the police finding Holman, that the role of each in that discovery was attenuated. Smith is without standing to assert the inadmissibility of Bowden's contribution to the description of Holman. Bowden is equally without standing to assert the inadmissibility of Smith's contribution. *Wong Sun* v. *United States,* 371 U.S. at 491–492. Furthermore, it cannot be assumed that, had Smith not mentioned Holman, Bowden would not have done so. Nor can it be assumed that upon the mention of Holman by either one, statements of the other were essential to finding Holman. Smith and Holman had been connected with the same football team (Tr. 541). Bowden had known Holman for seven years (Tr. 540). Quite obviously each could have led the police to Holman independently. Indeed, although Officer Preston testified that Smith and Bowden "collaborated" in furnishing

a description of Holman (Tr. 225), there is no showing at all that the actual contribution of each appellant at that time was not sufficient in itself to lead the police to Holman. These considerations attenuate even further the significance of the contribution of each appellant to Holman's description and to his discovery.[10]

b. The law is that even a "but for" showing does not require a ruling that evidence is "fruit of the poisonous tree." In *Wong Sun, supra*, the Supreme Court said: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maquire, Evidence of Guilt, 221 (1959)." 371 U.S. at 487–488. Here, even if the facts of this case were such that the Court could find that Holman's *identity* would not have been discovered except for the inadmissible statements of both appellants, his *testimony* at trial still cannot be said to have been "come at" by exploitation of that discovery. The name of a witness is one thing. His testimony at the trial is quite another. The witness himself is not evidence. Only his testimony is. Here the case for conviction of Smith and Bowden was not made upon discovery of Holman. The conviction depended on Holman's willingness to waive his privilege against self-incrimination, and also on his independent choice to tell the truth. Neither decision on Holman's part necessarily followed from his discovery. He did not have to waive his privilege at the coroner's hearing, or at the trial, but he chose to do so (Tr. 533–534, 628–629). Nor

[10] It is to be noted that Judge Youngdahl's opinion, as originally drafted, apparently found that Smith alone had led the police to Holman (Tr. 386, 405). The judge nevertheless said he thought Holman's testimony was inadmissible as to Bowden as well as to Smith (J.A. 405). At the request of Bowden's counsel the judge amended his opinion so that it showed that the pair "collaborated" in providing a description of Holman (Tr. 428–429, J.A. 7, 18).

was he compelled to tell the truth when he testified, and the record shows that he did not do so until the trial. There was a crucial difference between Holman's testimony at the coroner's inquest and his testimony at trial. At the inquest he said that he did not see Merson and that he did not see Smith strike Merson (Tr. 628–629, 660–661). At the trial he said that he did see Merson and that he did see and hear Smith strike him (Tr. 556, 562–564, 664–666). This critical change, which assured Smith's and Bowden's conviction for the crime to which they had confessed, was brought about, not by "exploitation" of the discovery of Holman, but by the action of Holman's own conscience. Between the murder in March and the trial in October Holman had a long time to think about what he had seen. As we have noted, he told the jury that he decided to tell the truth because "I used to think about it all the time * * * I used to think about it at night all the time * * * because I kept thinking about the man, the man dead" (Tr. 629). His conscience compelled his truthful testimony, and it did so only after a strenuous contest between his conscience and himself. Such testimony is not "tainted," and the "fruit of the poisonous tree" doctrine does not require suppression of it, even if that doctrine were applicable to extend the effect of *Mallory* and *Harling*.[11]

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[11] a. Smith says (Br. 14) that the prints taken from him on October 15, 1962, are inadmissible. But Smith was under legal detention awaiting trial at the time, the Commissioner having ordered him held and the grand jury having indicted him (Tr. 164; J.A. 1). The government has a perfect right to take fingerprints from prisoners under legal detention. *Kelley* v. *United States*, 55 F. 2d 67 (2d Cir. 1932). The essence of Smith's complaint is that if one is held on a showing of probable cause that includes evidence not admitted at trial, one's detention on such showing while awaiting trial is illegal. Such is not the law. *Costello* v. *United States*, 350 U.S. 359 (1956). Further, 24 D.C. Code §§ 413–415 cannot reasonably be read to make illegal Smith's presence in the Marshal's cell-block in the court house where the prints were taken (Tr. 331, 332). In any event, in this context the enforcement of these sections of the Code by the formulation of a new exclusionary rule would be totally unwarranted.

b. Bowden says (Br. 27) that there was insufficient evidence that he robbed Merson. But his own recitation of the testimony elicited at trial from Holman and others, to say nothing of the transcript of the trial and the summary of it in this brief, shows that the circumstantial evidence that

CONCLUSION

With all due respect to the trial judge, we do not think the dictum in his memorandum on the admissibility of Holman's testimony is supported by the record or the law. The memorandum relies on general language in *Silverthorne, Bynum,* and *Killough* which is not controlling on the question of whether the "fruit of the poisonous tree" doctrine applies to exclude evidence mentioned in Smith's and Bowden's *Mallory* and *Harling* confessions. Assuming the doctrine does apply to the confessions, neither the language nor the holdings of the cases cited by the trial judge require the exclusion of Holman's testimony under that doctrine or on any other basis. The judge's memorandum ignores fundamental and obvious factual and legal distinctions between a., evidence excluded in *Silverthorne, Bynum,* and *Killough,* and b., the testimony of witnesses to crime in general and Holman's testimony in particular. The memorandum would insulate appellants forever from Holman's independent knowledge of the crime and his independent will to testify. It ignores the unique facts about the crime and the witness Holman, and about the arrest of appellants in circumstances requiring the conclusion that they were preparing to repeat their crime, which make it insupportable for appellants to claim that Holman would not have been found but for their mention of him. The memorandum takes no account of how attenuated are the links between the statements of each appellant about Holman and the discovery of his identity, and between

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Bowden robbed Merson was overwhelming. Merson's words to William Branch, "*They* hit me," (emphasis added), were by themselves sufficient evidence on which the jury could find that the dying man saw two men, Bowden as well as Smith, bend over him to rob him (Tr. 520). Note also Holman's testimony that Smith "split" the booty with Bowden, "ten for you, ten for me * * *," and that Smith, quite obviously in Bowden's presence, told Holman: "If you just came across the street and searched the man's pockets * * * you would have gotten some more" (Tr. 566–567, 619–620). We respectfully suggest that if the judge erred at all in assessing the facts as to Bowden, he did so in directing his acquittal on the felony-murder and murder counts. Certainly no reasonable hypothesis of Bowden's innocence of the robbery can be drawn from the evidence.

Holman's discovery and his testimony at trial. We respectfully submit that Judge Youngdahl's dictum is not and should not be the law, and that this Court should affirm the judgments of conviction.

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U.S. GOVERNMENT PRINTING OFFICE: 1963

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,466

WILSON M. SMITH, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 17,534

RAYMOND BOWDEN,

Appellant,

v

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

[Filed April 19, 1962]

[INDICTMENT]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on March 6, 1962

UNITED STATES OF AMERICA	Criminal No. 324-62
v.	Grand Jury No. Orig.
WILSON M. SMITH, JR., RAYMOND BOWDEN, Defendants.	Violation: 22 D.C.C. 2401 (Murder in the First Degree - killing while perpetrating and attempting to perpetrate the crime of robbery) 22 D.C.C. 2401 (Murder in the First Degree) 22 D.C.C. 2901 (Robbery)

The Grand Jury charges:

On or about March 3, 1962, within the District of Columbia, Wilson M. Smith, Jr. and Raymond Bowden did kill Miksa Merson while perpetrating and attempting to perpetrate the crime of robbery, which is set forth in the third count of this indictment.

SECOND COUNT:

On or about March 3, 1962, within the District of Columbia, Wilson M. Smith, Jr. and Raymond Bowden, purposely and with deliberate and premeditated malice, murdered Miksa Merson by means of striking him with the limb of a tree.

THIRD COUNT:

On or about March 3, 1962, within the District of Columbia, Wilson M. Smith, Jr. and Raymond Bowden, by force and violence and against

resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Miksa Merson, property of Miksa Merson, of the value of about $116.00, consisting of one wallet of the value of $1.00, one watch of the value of $25.00 and $90.00 in money.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

* * *

[Filed April 13, 1962]

PLEA OF DEFENDANT
(2-Raymond Bowden)

On this 13th day of April, 1962, the defendant Raymond Bowden, appearing in proper person and by his attorney Bernard Margolius, being arraigned in open Court upon the indictment, the same being read to him, pleads not guilty thereto.

Copy of indictment given to the defendant.

The defendant is remanded to the District Jail.

By direction of
MATTHEW F. MCGUIRE
Presiding Judge
Criminal Court # ASSIGNMENT

* * *

* * *

[Filed June 4, 1962]

MOTION TO SUPPRESS EVIDENCE
[Raymond Bowden]

The defendant, Raymond Bowden, by his attorney, moves this Court to direct that certain property which on the 10th day of March, 1962, in the District of Columbia, was unlawfully seized and taken from him by members of the Metropolitan Police Department of the District of

Columbia, be suppressed as evidence against him in this proceeding and any other proceeding.

Defendant further states that said property, a gold watch, was in his possession when taken from him. That the search and seizure was made without his consent, was illegal, unlawful, against his will, without authority of a warrant of any kind, and without probable cause and not incident to a lawful arrest.

Defendant further states that he is a juvenile, 17 years of age, and that such property can not be introduced as evidence against him in this court, having been taken from him prior to waiver by Juvenile Court. See Harling v. United States, U.S. Court of Appeals, No. 15909.

/s/ Bernard Margolius
Attorney for defendant Bowden

* * *

* * *

[Filed Oct. 23, 1962]

MEMORANDUM ON MOTIONS TO SUPPRESS
(Wilson M. Smith, Jr. and Raymond Bowden)

The motions of defendants Bowden and Smith to suppress certain items of evidence upon the ground that those items were illegally obtained by the police came on to be heard by the Court after the jury had been selected and excused pending the outcome of this hearing. The Court heard two days of testimony, and now makes the following findings of fact and conclusions of law.

I

Both defendants were arrested on Friday, March 9, 1962, at 9:45 p.m., suspected of a purse-snatching not connected with the robbery charged against them in the present indictment. The reason the two were arrested was that they were in the neighborhood of the purse-snatching; they roughly fit the general description of the perpetrators of the purse-snatching; and they had not satisfactorily explained to a police officer

why there were in the neighborhood. They were brought to police headquarters, Number 13 precinct, for a line-up, but they were not identified by the complainant as having anything to do with the purse-snatching. The 17-year old juvenile, Bowden, was released to his parents at approximately midnight, but Smith, age 20, was kept over night at the jail without any charge having been lodged against him. As of that time, there was no crime of which Smith was even suspected of having committed.

The next morning at 8:45 a.m., Saturday, March 10, Smith was placed in a city-wide line-up at No. 1 precinct. The purpose of this line-up "is to acquaint the detectives working throughout the city with the persons who have been arrested in the city so that they may be identified, perhaps, as connnected with some other crime in a precinct other than their own." (Tr. 137). Officer Preston, of Homicide Squad, viewed that line-up, and learned that Smith had been picked up at a place which he knew to be very close to the place where Miksa Merson had been murdered on the street the week before, on March 3. Officer Preston also noticed that Smith was wearing a jacket that appeared to have blood stains on it. At approximately 9:05 a.m., Officer Preston took Smith to the Homicide Squad office for questioning.

There, Officer Preston questioned Smith about his whereabouts the night before, and also about his whereabouts on March 3, the night of the Merson murder. Smith said that he was sure that on March 3, he had entered a movie theatre at about 7:30 p.m., although he could not remember the name of the theatre, the admission price, or the name of the motion picture he had seen. Officer Preston had not questioned Smith about the specific time of 7:30 p.m., which he knew to have been the time of the Merson murder. The officer asked Smith if Bowden had been with him on March 3. Smith responded that he had not.

At 10:05 a.m., Smith consented to have his finger and palm prints taken. Several days later, these prints were found to correspond to prints on an anonymous letter which had been sent to the police on March 8, containing personal effects of the victim.

At 10:30 a.m., Officer Preston asked Officer Eccles to go to Bowden's home to find out if Bowden had been with Smith on March 3.

At about 11:20 a.m., Smith said that he would take a lie-detector test. The test began at 11:30 a.m. and lasted until 2:00 p.m. Officer Preston testified that at the close of the test he concluded that Smith was not truthful, and that "he was, in fact, involved in the homicide." (Tr. 147).

In the meantime, Officer Eccles had gone to the home of Bowden with another officer. Officer Eccles told Bowden's mother that the police wanted to find out if Bowden was with Smith on March 3, and that he wanted Bowden to come with him to headquarters. Bowden's mother said that he could go, and she called for him to get out of bed and come downstairs. Officer Eccles told Bowden that he wanted Bowden to come to headquarters "to try and clear Smith." (Tr. 305). Bowden agreed. Officer Eccles testified that he would not have "arrested" the boy if the boy had refused to come.

About half an hour after Bowden and the officer arrived at headquarters, Officer Eccles noticed that Bowden was wearing a round gold watch with a sweep second hand. Without advising him of his right to remain silent or of his right to have an attorney, Officer Eccles asked Bowden where he had gotten the watch. Bowden said that his mother had given it to him. Officer Eccles then went to the outer office, where Bowden's mother, who had not come to headquarters in the police vehicle, was by now waiting. She told Officer Eccles that she had not given her son a watch. The officer then returned to Bowden, who changed his story and said that he had gotten the watch from another boy on March 3 He said that when he got it, the watch had a stretch-type band on it, but that he had thrown it away and put on a black cloth-type instead. Officer Eccles knew that Merson's watch had had a stretch-type band. He then told Bowden that he was under arrest for the murder of Miksa Merson on March 3.

When Officer Preston finished giving Smith the lie-detector test, he immediately proceeded to give Bowden the test. Bowden's mother was not asked to give her consent. Officer Preston described Bowden's test

as "a peak of tension test," (Tr. 151); it lasted from 2:00 until 6:00 p.m. After Bowden's test was completed, Bowden finally admitted that he knew about the crime, but asserted that Smith had committed the murder and had told him, Bowden, about it.

A few minutes after 6:00 p.m., Officer Preston brought Smith and Bowden face to face. Smith still denied any participation, and Bowden retracted his statement accusing Smith. Smith was then taken to the cell block. Bowden now finally broke down, admitted his own involvement, and said that he would show the officers the escape route which had been used after the murder.

At 6:45 p.m., Officer Preston and another officer went with Bowden to the area of the crime. Bowden pointed out where the money and watch had been divided, and where some articles belonging to the victim had been discarded. The officers and Bowden returned to headquarters sometime after 7:30 p.m. Sometime during the evening, Bowden was given what apparently was his first food of the day -- a sandwich. At headquarters, Bowden signed a written statement that he had taken the wallet from the victim; that Smith had taken the watch; and that Smith had hit the victim twice with a club, causing the death.

Immediately after this statement was signed, an attorney appeared for the first time, at 8:00 or 8:15 p.m. Bowden's mother had asked the attorney to find out why her son was being held, for which task she paid him $20. The attorney entered the office in which Bowden was being held. Officer Preston heard the attorney tell Bowden "(t)hat if he was involved, that he should tell the truth, and be entirely truthful and clear it up." (Tr. 221). Officer Preston did not hear the attorney advise Bowden that he had a right to remain silent.

Bowden was then turned over to the juvenile squad, placed in the Receiving Home, and charged with homicide.

Between 6:00 p.m. and midnight of that same Saturday, police officers conferred several times with an Assistant United States Attorney in order to determine whether Smith should be brought before the Commissioner. The Government attorney told the police that there was not

yet enough evidence to bring Smith before the Commissioner, and that Smith -- who had been in custody for roughly 24 hours already -- should be detained for a reasonable length of time for further questioning.

On Sunday morning, March 11, beginning at approximately 10:30 a.m., Smith was interrogated by Officer Preston again. This time, Smith broke down, admitted his full participation in the homicide, and said that besides himself and Bowden, a third person -- later discovered to be named Holman -- also participated. This was the occasion on which the police first learned of Holman's involvement, at 11:30 a.m. (Tr. 172, 223). In the course of his oral confession, Smith admitted that it was he himself who had struck the victim twice with a fallen tree limb in order to take whatever money and valuables the victim (apparently chosen because he happened to drive up in his automobile to park on the street) had upon his person. Sometime during this oral confession, Smith requested that Bowden come in to listen; so about noon, or shortly thereafter, Bowden was brought from the Receiving Home to the Homicide office for a second confrontation. No attorney was present. At that time, Bowden and Smith called the third person "Red" and collaborated in providing the police with a description which enabled the police to determine the third person's name -- Holman. (Tr. 225).

Smith then went with the officers to the scene of the crime and showed them the escape route. In addition, he located a snap-type purse which had belonged to the victim and which Smith had discarded on the night of the murder. Prior to this time, the officers had known nothing about this purse.

They returned to the Homicide office at 2:15 p.m., and a written statement was taken from 2:30 until 3:30 p.m. Between 4:00 and 4:20 p.m., the victim's brother came to the office. Smith and Bowden both admitted to this brother what they had done, and Smith said that he was sorry. Smith was then returned to the cell block, and Bowden, together with Holman -- who, since the morning, had also been charged with homicide -- were sent to the juvenile Receiving Home.

Smith was taken before the Commissioner the next morning, Monday,

March 12, at 10:00 a.m., at which time he was advised of his rights to remain silent and to consult an attorney. No attorney was present when Smith was presented to the Commissioner. Smith had been in custody since Friday night -- a total of over 60 hours. During all of this time, he had never been told that he was entitled to have an attorney, although Officer Preston testified that both before the lie-detector test on Saturday and before the interrogation on Sunday, he advised Smith that he did not have to make any statement.

On Wednesday, March 14, the coroner's inquest was held. Smith was present, and was represented by an attorney, employed by the Legal Aid Agency, who advised Smith to make no statement. Holman testified as a witness and was represented by an attorney. Bowden apparently had no attorney of his own.

On Thursday, March 15, in response to a request by Smith made on Sunday, March 11, Officer Preston brought Smith's "girl-friend" to see Smith at the jail. They arrived at about 11:45 a.m. and waited in the rotunda. Shortly after noon, Smith came in. The officer testified that the usual practice was for a prisoner and a relative to talk to each other over a speaker while physically separated by a glass panel. On this occasion, however, Smith, the "girl-friend," and Officer Preston sat together at a table in the jail rotunda. The officer admitted that he was "not unaware" that he might obtain information from this conversation. (Tr. 204). The officer overheard the entire conversation, which included a statement by Smith that he had killed the man although he had intended only to rob him. Smith then turned to the officer and asked if the officer thought Smith needed a lawyer. The officer testified that he then told Smith "that I thought he needed the best lawyer that he could get" (Tr. 187). Smith gave his "girl-friend" the telephone number of a person whom he thought could help obtain a lawyer. Officer Preston then told Smith that he could testify in court to anything Smith might say, but Smith continued talking without a lawyer present. At 12:40 p.m., Officer Preston and the "girl-friend" left the jail.

On Friday, March 23, the Juvenile Court waived its jurisdiction over Bowden, and Bowden was brought to police headquarters. Officer Preston, who had not seen Bowden since Sunday, March 11, and another officer then took Bowden from headquarters to the Commissioner. Bowden asked the officer what a "waiver" meant, and the officer responded that he would now be tried as an adult. Before he was placed in the U.S. Marshal's cell block, Bowden -- according to Officer Preston -- asked the officer: "(A)re you going to see me, are you going to talk to me?" And the officer replied that he would talk to him after Bowden had been presented to the Commissioner. (Tr. 195). Bowden was presented to the Commissioner shortly after 10:30 a.m.

Immediately thereafter, Officer Preston went to the cell block to talk to Bowden -- again not in the presence of a lawyer -- but was detained on another matter and did not see Bowden until about 12:40 p.m. Between then and 1:00 p.m., Bowden talked about the crime again -- without a lawyer present -- about Holman's involvement; Smith's possibly greater share in the proceeds of the robbery; and Bowden's own purchase of a new watchband. He said that he had bought two sport shirts with his share and had lost the rest in a pool hall.

Officer Preston again saw Bowden on March 29, at which time Bowden described his life at the jail, said that the food was good, and again emphasized that Holman was more involved than Holman had admitted. Bowden said that he wanted to testify against Holman. A lawyer was not present during this conversation.

The Government seeks to introduce five pieces of evidence obtained during the series of events described above:

1. Fingerprints taken from defendant Smith on Saturday, March 10.

2. Statements made by defendant Smith to his "girl-friend" on Thursday, March 15.

3. Statements made by defendant Bowden on Friday, March 23, immediately following his appearance before the Commissioner.

4. The watch seized from defendant Bowden on Saturday, March 10.

5. Testimony of witness Holman.

II

If it were for this Court to decide guilt or innocence on the basis of the series of events described above, there would be no doubt of the decision. But guilt or innocence in a court of law must be established in a particular way -- by methods which the Supreme Court has said "commend themselves to a progressive and self-conficent society." McNabb v. United States, 318 U.S. 332, 343-4 (1943).

For a juvenile, the methods must conform to "principles of 'fundamental fairness'," and admissions made by a juvenile while still within the "non-criminal and non-punitive" setting of the Juvenile Court are inadmissible in an adult court following a waiver of jurisdiction. Harling v. United States, 111 U.S. App. D.C. 174 (1961).

For an adult, the methods must be free not only of torture, inquisition, and the "third degree," but also of more subtle forms of coercion. Ours is a system in which the Government must accuse a defendant of a crime and then prove its case beyond a reasonable doubt. The defendant need not participate in helping the Government prove its case; he has the constitutional right to remain silent.

In order that courts, juries, and the public may be satisfied that coercion has not been used, and that the defendant knows his rights, the Federal Rules of Criminal Procedure provide that an arrested person shall be brought before a judicial officer, the U. S. Commissioner, "without unnecessary delay" after arrest, in order that the judicial officer may determine whether there is probable cause for the arrested person to be detained, and in order, further, for the Commissioner to inform the arrested person of his rights to remain silent and to have an attorney. These functions are thus taken away from the police, and entrusted to the independent judgment of the Commissioner. In no uncertain terms, Rule 5(a) provides:

> "An officer making an arrest under a warrant issued upon a complaint of any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of

the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith." (emphasis added)

In order that these important procedures should not become empty words, the Supreme Court has unanimously applied an exclusionary rule to any confessions obtained from an arrested person during a period of "unnecessary delay" in bringing the arrested person before the Commissioner. Mallory v. United States, 354 U.S. 449 (1957). In language which should be clear and commanding to all, that court there declared:

> The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on "probable cause." The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined. The arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support that arrest and ultimately his guilt.
>
> The duty enjoined upon arresting officers to arraign "without unnecessary delay" indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession. 354 U.S. at 454-55.

At the outset, it must be noted that the Government has conceded, as it must under Mallory, that all statements made by defendant Smith after his arrest Friday night and before he was brought before the Commissioner Monday morning are inadmissible. It would be hard for the Court to imagine a more patent violation of the clear command of Rule 5(a)

and Mallory. It is indisputable to this Court that defendant Smith, after the identification on another robbery charge failed, was illegally held in custody on suspicion and solely for the purpose of interrogation. At no time during his long detention of 36 hours before his written confession was obtained did he have the benefit of legal advice. Even assuming arguendo that the officers were justified in holding him until Saturday evening, March 10, 24 hours after being brought into custody, certainly at least by that time he should have been either released or brought before the Commissioner. Instead, as the Assistant United States Attorney testified, it was his opinion that the defendant could be held for an additional reasonable time for interrogation. What he meant, or what the officers would have considered "an additional reasonable time" was not made clear by the testimony. It seems to the Court that this interpretation of Rule 5 completely overlooks its plain language and eliminates the protection it was designed to afford defendants.

The Government has also conceded, as it must, that under Harling, supra, all statements made by the juvenile defendant Bowden, while within the jurisdiction of the Juvenile Court, are inadmissible in adult proceedings following a waiver by the Juvenile Court. Concerning the written and oral confession obtained from the minor before his waiver, there is even stronger reason (if such there can be) for striking down these confessions. This 17-year old boy was brought to police headquarters without a warrant; he was not advised that he was entitled to counsel nor that he did not have to make a statement. And yet the officer, upon observing a wrist watch, proceeded to question the boy concerning the watch, and when the officer concluded that the answers seemed suspicious, he placed the boy under arrest. A lie-detector test was then given without his mother's permission, and the oral and written confessions followed in due course. These confessions must, of course, be suppressed.

But clear rulings of the Supreme Court and of the Court of Appeals require this Court to go further and to exclude four items of evidence which the Government seeks to introduce against these defendants. Two items concern defendant Smith, and two concern defendant Bowden. Each

of these evidentiary items that must be excluded will now be considered separately.

1. Fingerprints taken from defendant Smith on Saturday, March 10.

These fingerprints were secured by the police during the period of "unnecessary delay," and so must be suppressed.

The Court of Appeals has held that fingerprints secured during detention following an illegal arrest are inadmissible in evidence. Bynum v. United States, 104 U.S. App. D.C. 368 (1958). Assuming arguendo that the arrest of Smith was legal, the illegality now discussed stems, instead, from the "unnecessary delay" in bringing defendant Smith before the Commissioner, as Rule 5(a) requires. There is no doubt, however, that the Court of Appeals would apply to fingerprints taken during the illegal delay the same principles which it applied to fingerprints taken following an illegal arrest. The following language from Bynum makes that clear:

> * * * In these situations it is deemed a matter of overriding concern that effective sanctions be imposed against illegal arrest and detention and the risks of overreaching inherent in such action. Even though highly probative and seemingly trustworthy evidence is excluded in the process, this loss is thought to be more than counter-balanced by the salutary effect of a forthright and comprehensive rule that illegal detention shall yield the prosecution no evidentiary advantage in building a case against the accused. [emphasis added] All of this is bottomed on the Constitution itself. The Fourth Amendment makes protection of the individual against illegal seizure or arrest a constitutional imperative. In the cited cases judicial authority over the manner on which justice shall be administered is exercised in a way calculated to implement the constitutional guarantee.

True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are

apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed. 104 U.S. App. D.C. at 370.

The Bynum case, therefore, not only states the general principle that an "illegal detention shall yield the prosecution no evidentiary advantage in building a case against the accused," but specifically applies this general principle to fingerprints. The Court is bound to follow that opinion and must, therefore, suppress the fingerprints in the present case.

2. Statements made by defendant Smith on Thursday, March 15.

The recent case of Killough v. United States, ____ U.S. App. D.C. _____ (No. 16398, decided October 4, 1962), requires this Court to suppress the statement made by defendant Smith on Thursday, March 15, because that statement was a direct product of the tainted statements made on Sunday, March 11.

Killough states the basic proposition that when a trial court is faced with two confessions, one of which preceded the appearance of the defendant before the Commissioner, and the other of which followed such appearance before the Commissioner, the court must exclude the second if it is the product of the first.

In Killough, the same officer who had taken the tainted confession was present at the later confession. The same is true in the present case. The police officer present on Thursday was the same officer who on the previous Saturday, March 10, had given defendant Smith a prolonged lie-detector test, and who on Sunday, March 11, had elicited from defendant Smith an oral confession and had then taken him to the scene of the crime in order to trace the escape route. The presence of this same officer would clearly lead defendant Smith to believe that there would be no point in concealing on Thursday what he had already revealed the previous Sunday. Therefore, unless the Court can find some event between Sunday and Thursday which might have brought home to defendant Smith his right to remain silent, the Court must suppress the Thursday confession.

Killough, clearly states that the warning of the Commissioner is not sufficient to bring this right effectively to the attention of an accused who has already given a confession. There must be, in addition, either a sufficient lapse of time, or the meaningful advice of counsel, or both. In the instant case, there was neither. The lapse of time between Sunday and Thursday had no appreciable effect upon the relationship between the officer and defendant Smith. And the only representation by counsel was at the coroner's inquest on Wednesday night. Such representation was fleeting, and strictly limited to those proceedings. There was, in short, no event between Sunday and Thursday sufficiently decisive to erase the effects of the first confession. The Court therefore finds that the Thursday confession was the direct result of the Sunday confession, and hence, under Killough, inadmissible.

3. Statements made by defendant Bowden on Friday, March 23.

On March 23, the Juvenile Court waived its jurisdiction over defendant Bowden in order that Bowden might be tried in adult proceedings in the District Court. "[I]n the District Court proceeding the Federal Rules must be observed." Harling, supra at 175. Thus the principles of Mallory and Killough apply to the statement made by defendant Bowden to Officer Preston following his waiver and his subsequent appearance before the Commissioner on the same day.

It is true that defendant Bowden was brought before the Commissioner "without unnecessary delay" from the time of his waiver by the Juvenile Court.

But it does not follow from the fact that Rule 5(a) was thus satisfied that any voluntary statements made by defendant Bowden after appearing before the Commissioner are admissible. Surely, if Killough requires this Court to inquire into the causal connection between two confessions by an adult, one of which preceded and one of which followed the adult's appearance before the Commissioner, then Killough and Harling, taken together, require this Court to inquire into the causal connection between two confessions by a juvenile, one of which preceded and one of which followed the juvenile's hearing before the Commissioner.

For this Court to hold otherwise would be to give the child less protection than the adult must receive. Such a holding would fly in the face of Harling, which requires greater protection for the child, in accord with "principles of 'fundamental fairness'." 111 U.S. App. D.C. at 176.

In the instant case, the confession of defendant Bowden immediately following his waiver and appearance before the Commissioner is a direct product of his earlier confession while he was in "the non-criminal and non-punitive setting" of the Juvenile Court. Harling, supra at 176. Indeed, just as in the case of defendant Smith, so in the case of Bowden did the same officer take both the first and second confessions. Moreover, defendant Bowden's only contact with an attorney was when he was brought into police headquarters on Saturday, March 10, at which time his mother secured an attorney to find out why defendant Bowden was being held. That task accomplished, the attorney apparently disappeared from the picture. His only advice to the boy was to tell the truth and clear the whole matter up. And finally, the interval of 13 days between the first and second confessions only reinforces the causal link between the two. For during all of that time, defendant Bowden was subject to "the flexible and informal procedures of the Juvenile Court," Harling, supra at 177. It is no wonder then, that on the way to his appearance before the Commissioner, defendant Bowden asked what a waiver meant. There is no indication that the officer who accompanied him on that trip, and who had already secured the one confession, told him anything about the stricter evidentiary standards of adult proceedings or about the right of silence applicable to criminal proceedings. In the face of the relationship which the officer had by that time established with the child, the Commissioner's warning fell upon uncomprehending ears. It is the officer who provides the link between the first and second confessions, and the second confession must therefore be suppressed as a direct result of the first.

4. The watch seized from defendant Bowden on Saturday, March 10.

The Government seeks to introduce into evidence a watch which allegedly belonged to the victim and which was taken from defendant Bowden's arm approximately thirty minutes after he was brought to police

headquarters on Saturday, March 10. The watch must be suppressed, however, because it was illegally seized from defendant Bowden.

It is a long-established principle that search and seizure without a warrant are legal if the search and seizure are incidental to a lawful arrest. It is necessary, therefore, to determine whether Bowden was lawfully arrested.

The Government contends that Bowden was not "arrested" until Officer Eccles formally told him that he was under arrest, at police headquarters. The Court, however, finds that defendant Bowden was "arrested" at the moment the officer entered the Bowden house and requested that the 17-year old come with him to headquarters. At that moment, in any realistic sense, defendant Bowden was forced to submit to the officer's "request," and was in custody. In the words of the Supreme Court, his "liberty of movement" was "restricted." Henry v. United States, 361 U.S. 98, 103 (1959). The Court of Appeals, moreover, has referred with approval to the following definition of "arrest":

> [I]n order for there to be an arrest it is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest. It is sufficient if the person arrested understands that he is in the power of the one arresting, and submits in consequence. Coleman v. United States, 111 U.S. App. D.C. 210, 295 F 2d 555, 563-4 (1961). (Emphasis added).

It is indisputable that in the present case, defendant Bowden -- who upon first view is obviously a juvenile -- felt himself in the power of the officer, and submitted in consequence. It is noteworthy, in this connection, that the officer admitted to the Court that no 17-year old juvenile whom he has "requested" to come to headquarters has ever refused. It is also noteworthy that the defendant's mother was not told that she could go with her son to police headquarters, and that she therefore had to find her own means of transportation. By the time defendant Bowden left home, he was in "custody" and "under arrest."

It therefore becomes necessary to determine whether the arresting officer had "probable cause" to make this arrest without a warrant. The Court finds that he did not. The arresting officer, at the time of arrest, had no basis for connecting defendant Bowden with the Merson murder, or with any other crime. He was merely told by the officer questioning defendant Smith that he wanted to find out if Smith and Bowden were together on March 3. Officer Eccles testified that he did not see the watch until after they had arrived at police headquarters, and that it was the watch which first alerted him to a possible connection with the Merson murder. In short, defendant Bowden was arrested merely for the purpose of investigation -- a purpose which is insufficient to meet the legal requirement of "probable cause."

Since defendant Bowden was not lawfully arrested, the subsequent seizure of the watch was tainted with illegality. The watch, therefore, must be suppressed.

III

The Government seeks a ruling which would admit into evidence the testimony of one Holman, a juvenile who allegedly participated in the crime. At the trial, he would presumably identify both Smith and Bowden as participants and describe in detail exactly what occurred. He is, as the Government attorney stated to the Court, the Government's chief witness.

The Court has a firm and abiding conviction that the testimony of Holman should be excluded because the police first learned of Holman's existence and participation from the tainted statements of Smith and Bowden on Sunday. The Court is convinced that the testimony of Holman is a direct product of these tainted statements, and that such testimony should likewise be excluded as tainted.

Nevertheless, this Court has decided, after long and deep consideration, that the doctrine of law which would exclude Holman's testimony has not yet been squarely applied by the Court of Appeals to violations of Rule 5(a). Indeed, only two weeks ago, that Court, sitting en banc in the Killough case, supra, made it clear that the question was still an open one.

This very trial Court had been faced in the Killough case with an argument by the defendant to the effect that the location of the victim's body had been discovered by tainted statements made by the accused during a period of "unnecessary delay," and that all testimony concerning that body should therefore be excluded because such testimony was the "fruit of the poisonous tree."

In that case, it was undeniable that the existence of the body and the testimony concerning the body were the direct product of the accused's tainted statements. The only question in this Court's mind was whether the doctrine of the "fruit of the poisonous tree" could be applied, when a prior Court of Appeals' case had suggested that the doctrine should not be applied to violations of Rule 5(a). Goldsmith v. United States, 107 U.S. App. D.C. 305 (1960). I therefore held that solely because of this prior case, the testimony was properly admitted into evidence. United States v. Killough, 193 F. Supp. 905, 922 (D.C. 1961).

Faced with this question when Killough was appealed, four members of the Court of Appeals wrote:

> "Appellant contends that the coroner's testimony stemmed from the illegally procured initial confessions and, therefore, was inadmissible as the 'fruit of the poisonous tree.' Since we reverse for the reason previously set forth [the inadmissibility of the statement made by the accused after his hearing before the Commissioner] it is not necessary to pass upon the admissibility of the coroner's testimony. Appellant in any event is entitled to a new trial and it is possible that the coroner may not be called to testify. With the confessions out of the case the question whether the coroner's testimony should be admitted may not arise, or may arise in a very different context at a new trial. Accordingly, we do not decide it "
> (slip sheet, p. 9)

Four members of the Court of Appeals dissented from the Court's failure to deal with the issue, stating that they

> suggest that four of the judges who vote to reverse have an absolute and inescapable obligation to pass on this issue since it will inevitably

> arise in a new trial and the District Court should not be left without guidance on this critical issue. For such clarification as is possible in light of failure to rule directly on the issue, it should be noted that the four dissenting judges would admit evidence of the body while four judges do not state any position; only one judge would suppress all evidence of the body as 'fruit of the poisonous tree.' In this posture it seems clear there is no holding in this case that evidence of the victim's body should be suppressed on retrial." (slip sheet, p. 37)

Yet even as the dissent spoke in this manner about the testimony concerning the body, the majority opinion adopted the language of the "poisonous tree" doctrine when it declared that the oral confession was obtained so soon after the illegally-procured confessions that the former was "the fruit of the latter." (slip sheet, p. 6). It is, therefore, unclear to this Court whether the Court of Appeals left open the question of the propriety of the "poisonous tree" doctrine, or merely the application of that doctrine to the corpus delecti.

To reinforce the uncertainty as to whether the "fruit of the poisonous tree" doctrine applies or does not apply to evidence obtained as a result of violations of Rule 5(a), the Government has called to the attention of the Court the case of Payne v. United States, 111 U.S. App. D.C. 94 (1961), cert. denied 82 Sup Ct. 131 (1961), where the Court of Appeals described a prior case as rejecting "the sort of 'fruit of the poisonous tree' argument advanced in the instant case." 111 App. D.C. at 98-98. Again, this Court is unclear whether it was the doctrine, or a particular application of that doctrine, which was condemned in Payne.

Solely because of the uncertainty which these statements leave in the Court's mind, this Court will admit into evidence the testimony of Holman. Nevertheless, this Court wants to make it abundantly clear that in its firm belief, the basic principle of Mallory, as extended in Killough, is that in order to make effective the important protections of Rule 5(a), the courts must exclude all evidence directly produced by a violation of that Rule. "[K]nowledge gained by the Government's own wrong cannot be

used by it." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

Of course, there will always be questions of whether, on the one hand, evidence was directly produced by the illegal detention, or whether, on the other hand, the connection between the two pieces of evidence is so attenuated, so speculative, so far-fetched, that the later evidence cannot properly be said to "result from" the earlier. See Gregory v. United States, 97 U.S. App. D.C. 305; 231 F.2d 258 (1956), cert. denied 352 U.S. 850 (1956).

This Court feels that despite the vicissitudes of the application of the "poisonous tree" doctrine, the principle which that doctrine was intended to express has consistently been applied to violations of Rule 5(a). Thus in consideration of the question of two confessions, one prior to the hearing before the Commissioner, and the other following such hearing, the issue has usually been stated in terms of whether the second confession was "independent" of the first. See Jackson v. United States, 106 U.S. App. D.C. 396, 273 F.2d 521 (1959); Killough, supra, slip sheet p. 6, footnote 5. Indeed, in the Killough case itself, this very trial Court had found the second confession to be "independent" of the first, but the Court of Appeals reversed essentially on the ground that the short time between the two, the complete absence of counsel in the interval, and the presence at the "reaffirming" confession of the very officers who had taken the tainted confession -- all combined to make the second confession legally dependent upon the first. There should thus be no uncertainty as to the legal standards to be applied, however differently judges might apply those standards to particular situations.

However, there appears to this Court to be no rational basis for distinguishing between a tainted confession which produces a later confession, and a tainted confession which produces a witness who participated in the crime. The Court of Appeals in Bynum, supra, could find no distinction between fingerprints obtained during an illegal detention, and confessions obtained during a similar period. Both, the Court said, have "the decisive common characteristic of being something of evidentiary

value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed." 104 U.S. App. D.C. at 369-70 (emphasis added). And in Killough, the Court specifically clarified its opinion in response to the dissenters by stating: "Our opinion excludes only evidence which is due to a violation by the police of their duty under Rule 5(a)." (slip sheet, p. 11, para. 7) (emphasis added). The Killough Court itself thus spoke not only of confessions, but of "evidence" generally. Indeed, a special standard for confessions would be indefensible.

The Government argues that the Payne case, supra, is "analogous to" the instant case. The Court vigorously disagrees. In Payne, the existence of the identifying witness was discovered in the police file of complaints similar in nature to the one on which the accused had been brought into headquarters. The only issue was whether that witness could testify at the trial even though, at the request of the police, the witness had identified the accused during a period of "unnecessary delay" in bringing the accused before the Commissioner. The Court there held that the witness could testify.

Here, by profound contrast, it is the very existence of the identifying witness, Holman, which was unknown to the police until defendant Smith told the whole story on Sunday morning, long after Smith should have brought before the Commissioner. Thus in the present case, the violation of Rule 5(a) clearly and directly produced the Government's chief witness; in Payne, by contrast, the violation of Rule 5(a) had nothing to do with the discovery of the identifying witness in the police files.

Thus, if this Court were free to decide this question according to principles which seem clearly applicable, this Court would exclude the testimony of Holman. But the Court has reluctantly concluded that in view of the language in Killough, it would be presumptuous for this Court to close a question which the Court of Appeals so recently and so definitely left open.

IV

On March 3, a brutal murder was committed. These defendants are charged with murder in the first degree and murder in the course of perpetrating a robbery -- both of which may result in capital punishment, and with a third charge of robbery. Needless to say, in view of the heinous nature of these offenses, a serious responsibility is placed upon this Court.

Nevertheless, our Supreme Court has repeatedly emphasized that the protections provided by the Constitution, laws and rules of court are to be given to all defendants -- regardless, of the character of the defendant and regardless of the viciousness of the offense. If these protections are to be discarded because of the public's aversion to the atrocity of the offense, then we should erase from the marble facade of the Supreme Court the words "Equal Justice Under Law."

The Court feels obliged to point out that if the defendants are convicted largely on the basis of Holman's testimony , and if the Court of Appeals thereafter reverses those convictions on the ground that Holman's testimony should not have been admitted, the resulting inability of the Government to secure a conviction -- barring some new evidence -- will not be wholly the responsibility of the courts. Indeed, the evidentiary questions which this Court has been required to consider would never have arisen if the clear statutory requirement of Rule 5(a) had been carried out by the police department.

It is clear that the advice given to the police officer on Saturday night by the Assistant United States Attorney to continue to hold defendant Smith for a further "reasonable time" was for the purpose of enabling the police, during the extended period of what this Court considers unnecessary delay, to build a case against both defendants. Yet it is precisely this result which Rule 5(a) and Mallory were designed to prevent. It would be well to restate the language the Supreme Court used in Mallory:

> The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on "probable cause." The next step in the proceedings is to arraign the arrested person before a judicial officer as quickly as possible so

that he may be advised of his rights and so that the issue of probable cause may be promptly determined. 354 U.S. at 454. (Emphasis added).

It would also be well to recall the important task which the Commissioner performs in deciding this issue of probable cause for an arrest. It is the existence of the Commissioner which is supposed to protect all citizens from the kind of abuse of police process which occurred in the instant case. If the Commissioner alone is not sufficient to secure that protection, then the courts must continue to fashion evidentiary rules which will bolster the Commissioner's strategic importance as a judicial officer who stands between the police and the citizens.

It seems strange that in view of the long-continued discussion of the Mallory rule, Rule 5, and arrests on suspicion and for investigation, see Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation (July, 1962, the so-called "Horsky Report"), that the activity which took place in order to secure the evidence at issue here, should have occurred at all. The fact that it did occur indicates the need for continuing education of police officers by the United States Attorney's office as to the law on arrests, detention, and the securing of confessions. It should be said in fairness to the officers and the United States Attorney's office that the evidence in issue herein was obtained before the decision in the Killough case. Nevertheless, that fact makes even stronger the need for continual communication between the courts, the police, and the United States Attorney's office. For it is only if the police are kept abreast of the continuing court refinements in the rules of evidence that illegal arrests on suspicion and violations of Rule 5 and Mallory will be eliminated. It should also be stated that, by the same token, for the police to obtain evidence illegally is to take away from the public, protections to which the public is entitled: the conviction of the guilty.

Because of the importance of such communication with the police, this Court is ordering that a full transcript of this hearing and of this memorandum be submitted to the Commissioners of the District of

Columbia for such study and action as they deem appropriate in order to eliminate further violations of Rule 5(a) and Mallory.

/s/ Luther Youngdahl
Judge

October 22, 1962

[Filed Dec. 11, 1962]

JUDGMENT AND COMMITMENT
(Raymond Bowden)

On this 7th day of December, 1962 came the attorney for the government and the defendant appeared in person and by counsel, Bernard Margolius, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of ROBBERY as charged in count number three and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative pursuant to 18 USC 5010 (c) under the provisions of the Federal Youth Corrections Act for a period of nine (9) years or until properly discharged by the Youth Correction Division of the Board of Parole.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Luther W. Youngdahl
United States District Judge.

* * *

[Filed Oct. 26, 1962]

JUDGMENT AND COMMITMENT
(Wilson M. Smith, Jr.)

On this 26th day of October, 1962 came the attorney for the government and the defendant appeared in person and by counsel, Kenneth D. Wood, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of killing another in perpetrating or attempting to perpetrate a robbery; second degree murder; robbery as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of the Remainder of his Natural Life or until discharged by operation of law on count one; Fifteen (15) Years to Life on count two, said sentence to run concurrently with the sentence imposed on count one; Five (5) Years to Fifteen (15) Years on count three, said sentence to run concurrently with the sentence imposed on count one.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Luther W. Youngdahl
United States District Judge.

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